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In the Supreme Court of the United States

OCTOBER TERM, 1994

ALLIED-SIGNAL AEROSPACE COMPANY, GARRETT ENGINE DIVISION AND GARRETT AUXILIARY POWER DIVISION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DAVID M. COHEN
VELTA A. MELNBRENCIS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit erred in upholding the use by the International Trade Administration (ITA) of a two-tier best information available (BIA) methodology as a means calculating antidumping duties.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 28 F.3d 1188. The opinion and judgment of the Court of International Trade (Pet. App. 11a-17a), which affirmed the ITA's remand determination, are reported at 833 F. Supp. 935. The ITA's remand determination (Pet. App. 18a-21a) is unreported. The first opinion of the court of appeals, remanding the case (Pet. App. 24a-40a), is reported at 996 F.2d 1185. The errata to that opinion (Pet. App. 41a) is unreported. The first opinion and judgment of the Court of International Trade (Pet. App. 42a-53a) are reported at 802 F. Supp. 463.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1994. The petition for a writ of certiorari was filed on September 26, 1994. The jurisdiction of this Court's is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States antidumping laws, 19 U.S.C. 1673 *et seq.* (1988 & Supp. IV 1992), protect domestic industries against dumping, that is, the sale of foreign manu-factured goods in this country at less than the fair market value of those goods in the country of manufacture. See *Zenith Elecs. Corp.* v. *United States*, 988 F.2d 1573, 1576 (Fed. Cir. 1993). Under 19 U.S.C. 1673, the Secretary of Commerce is authorized to investigate dumping, and, if dumping is determined to exist and the International Trade Commission (ITC) also determines that dumping has injured or threatens to injure a domestic industry, 19 U.S.C. 1677(4), the Secretary may impose a duty on the dumped merchandise equal to the "dumping margin," *i.e.*, the amount by which the foreign market value (FMV) of the imported merchandise exceeds the United States price (USP). 19 U.S.C. 1673.

To determine the amount of antidumping duties to be assessed upon an imported product, the International Trade Administration (ITA) conducts periodic administrative reviews during which it compares the price at which the product is sold in the exporting country with the price at which it is sold to the United States. 19 U.S.C. 1675(a). To make that price comparison, the ITA ordinarily needs the manufacturer's sales data. If the manufacturer fails to produce those data upon request, the ITA "shall * * * use the best information otherwise available" (BIA). 19 U.S.C. 1677e(c). The antidumping

statute does not specify the manner in which the BIA must be selected.[1]

In 1988 and 1989, the ITA conducted a less-than-fair-value (LTFV) investigation of antifriction bearings. It found that antifriction bearings from France were being sold, or were likely to be sold, in the United States at less than fair value. Pet. App. 26a. For ball and cylindrical roller bearings from France, the ITA determined specific dumping margins for three investigated companies. The ITA also set the dumping margin, for "all other[]" non-investigated companies, of 65.13% for ball-bearings, and 17.31%, for cylindrical roller bearings.[2] *Ibid.*; 54 Fed. Reg. 19,096 (1989).

In 1990, the ITA began administrative review of antifriction bearings imported from France in order to

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[1] An ITA regulation provides that "[i]f an interested party refuses to provide factual information requested by the Secretary or otherwise impedes the proceeding, the Secretary may take that into account in determining what is the best information available." 19 C.F.R. 353.37(b).

[2] When a particular company is specifically investigated during an LTFV investigation, the Commerce Department assigns to it a specific calculated rate. When a particular company is not specifically investigated during that investigation, Commerce assigns to it an "all others" rate. That rate—calculated by weight-averaging all company-specific rates above the *de minimis* level—is applied to all companies not specifically investigated. *Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 18,992, 19,040 (1989) (German LTFV Determination). ITA has explained that such weight-averaging produces a rate which is a reasonable estimate of the pricing practices of non-investigated companies. The Court of International Trade upheld this methodology as reasonable and entitled to judicial deference. *Serampore Indus. Pvt. Ltd.* v. *United States Dep't of Commerce*, 696 F. Supp. 665, 667-668 (Ct. Int'l Trade 1988).

determine the amount of antidumping duties to be assessed upon such bearings imported between November 9, 1988, and April 30, 1990. Pet. App. 27a. To calculate the dumping margins for SNFA S.A. (SNFA), a French manufacturer of antifriction bearings, the ITA requested SNFA to produce general corporate, sales, and cost data. SNFA, however, produced only general corporate information. Pet. App. 27a, 75a. As a result, the ITA was unable to determine an actual dumping margin for SNFA.

Accordingly, the ITA utilized the best-information-available mechanism. The ITA used as its BIA the highest rates determined for any individual firm in the earlier French LTFV investigation. Those were the 66.42% rate for ball bearings and the 18.37% rate for cylindrical roller bearings. Use of the highest rate for any individual firm resulted from the ITA's previously adopted two-tier method of selecting a BIA in such circumstances. Under that approach, when a company refuses to cooperate with Commerce or significantly impedes its investigation, the ITA uses as BIA the higher of (1) the highest rate found for any firm for the same class of merchandise in the same country of origin in the LTFV investigation, or (2) the highest rate found in the instant review for the same class or kind of merchandise in the same country of origin. When a company has cooperated with the investigation but has nonetheless failed to provide the information requested in a timely manner or in the form required, the ITA uses the higher of (1) the firm's rate, from the LTFV investigation for the subject merchandise (or, if the firm was not individually investigated, the "all others" rate from that investigation), or (2) the highest calculated rate in the review. Pet. App. 69a, 75a. The ITA had first

adopted that two-tier BIA methodology in its 1989 LTFV investigation of antifriction bearings.[3]

The Court of International Trade sustained the ITA's treatment of SNFA. It held that, because SNFA had failed to complete the ITA's questionnaire, the ITA was justified in resorting to BIA. Pet. App. 50a. The court also upheld the ITA's use and application of the two-tier methodology because (1) that methodology measured the level of cooperation exhibited by a respondent, which the ITA is expressly allowed to consider in determining what to use as BIA by 19 C.F.R. 353.37(b); and (2) the methodology enabled the ITA to determine expeditiously which BIA measure to use, enabling it to complete administrative proceedings within stringent statutory deadlines. Pet. App. 49a.

Petitioner, a domestic importer of anti-friction bearings, appealed to the Court of Appeals for the Federal Circuit. The court held that the ITA's two-tier methodology was a reasonable and permissible exercise of its statutory authority to use BIA when a respondent refuses or is unable to provide requested information. Pet. App. 34a-37a. But, the court held, SNFA had been a cooperative respondent. Thus, the ITA should have applied the second tier, not the first tier, of its

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[3] The ITA stated there:

> In deciding what to use as best information available, the Department's regulations provide that the Department may take into account whether a party refuses to provide requested information. 19 CFR 353.51(b). Thus, the Department may determine on a case-by-case basis what is the best information available. For the purposes of these final determinations, we have applied two tiers of best information available depending on whether the companies attempted or refused to cooperate in these investigations * * *.

German LTFV Determination, 54 Fed. Reg. 19,033 (1989).

methodology. The court remanded the case to the Court of International Trade to direct the ITA to recalculate the dumping margins under the second tier of the BIA methodology. Pet. App. 37a-40a.

On remand, the ITA applied the second tier of its two-tier BIA methodology to SNFA's bearings. Because SNFA had not been among the companies specifically investigated in the earlier LTFV investigation, the rates dictated by use of that tier were the "all others" rates from the LTFV investigation—that is, a 65.15 % rate for ball bearings, and a 17.31 % rate for cylindrical roller bearings. Pet. App. 20a-21a.

The Court of International Trade affirmed (Pet. App. 15a), and on petitioner's ensuing appeal, the court of appeals affirmed. It held first that the ITA had acted consistently with the remand order by using the "all others" rate. It termed petitioner's claim that the ITA had violated the terms of that order "a poorly disguised attempt to reargue what has already been decided." Pet. App. 7a.

The court also rejected the claim that the ITA had departed from prior policy in using the "all others" rate and that this "change of course" was not supported by substantial evidence, as required by this Court's decision in *Motor Vehicle Mfrs. Ass'n of the United States* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Pet. App. 8a-9a. Unlike the regulation at issue in *Motor Vehicle*, the ITA's adoption of the two-tier BIA methodology in 1989 "did not rise to the level of an agency regulation having the force and effect of law." Pet. App. 9a. The fact that the ITA had not previously used an "all others" rate did not preclude the ITA from utilizing a different methodology when, as in the present case, the agency had determined in its discretion that the circumstances so warranted. Pet. App. 8a-9a. The

court noted that the ITA had previously explained that its determination of BIA for a nonresponsive party would be decided on a "case-by-case" basis and that, for SNFA, the two-tier methodology was the appropriate means of assessing BIA. The court noted that it had upheld that conclusion in its prior decision remanding the case. Given the discretionary and case-specific nature of BIA determinations, the court stated that the ITA was obliged only to use a methodology consistent with its statutory authority. It was not required to supply a "reasoned analysis" under *Motor Vehicle* justifying use of the two-tier method. Pet. App. 9a-10a.

ARGUMENT

1. Petitioner renews its claim (Pet. 9-12) that the ITA's use of the "all others" rate in setting its dumping margin conflicts with the requirement in *Motor Vehicle* that an agency's changes of policy be supported by a reasoned explanation. Petitioner's claim that the court below misapplied *Motor Vehicle* is incorrect. Moreover, this case involves solely the fact-specific issue of whether the settled *Motor Vehicle* principle was properly applied in a particular case. It raises no broad issue meriting review.

As the court of appeals recognized, *Motor Vehicle* requires that an agency's decision to revoke an existing regulation promulgated under the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553, is void as arbitrary and capricious absent a reasoned explanation for that revocation. Pet. App. 9a; *Motor Vehicle*, 463 U.S. at 57. But as the court below also recognized, the ITA's use of a two-tier BIA methodology in this case did not constitute such a "change of course." Pet. App. 9a. Instead, formal adoption of that methodology merely reflected a codification of previously used

alternatives for selecting BIA, in which selection of BIA has been keyed to a party's degree of cooperation and to other particular facts.

The two-tier methodology for selection of BIA accords with the ITA's regulations (19 C.F.R. 353.17) and precedent, in which the ITA has long emphasized the importance of case-specific inquiry.[4] And by providing in the second tier of its methodology for use of the "all others" rate from an earlier LTFV investigation when (as here) no rate for the particular company is available, the ITA acted in accordance with its prior practice. The agency had in previous cases used as BIA the "all others" rate from an LTFV investigation when it determined that circumstances warranted selection of such a rate.[5]

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[4] See, *e.g.*, *Final Results of Antidumping Duty Administrative Review; Steel Jacks from Canada*, 52 Fed. Reg. 32,957 (1987) ("[s]election of the best information available is made on a case-by-case basis. It is our policy to evaluate the nature of the information available and the degree of cooperation received in exercising our discretion to choose the appropriate information to use in such situations"); *Brass Sheet and Strip from Sweden; Final Results of Antidumping Duty Administrative Review*, 57 Fed. Reg. 29,278 (1992); *Replacement Parts for Self-Propelled Bituminous Paving Equipment From Canada; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 47,451, 45,454 (1991).

[5] See, *e.g.*, *Certain Internal-Combustion, Industrial Forklift Trucks From Japan; Preliminary Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 23,675, 23,676 (1991); *Certain Iron Construction Castings From Brazil; Final Results of Antidumping Duty Administrative Review*, 55 Fed. Reg. 26,238, 26,239 (1990). See also *Bicycle Tires and Tubes From Taiwan; Final Results of Antidumping Duty Administrative Review*, 51 Fed. Reg. 43,752 (1986) (stating that because Li Hsin provided an inadequate response, ITA used BIA for assessment purposes and that the BIA (3.65 %) was the rate published in the antidumping duty order). The 3.65 % rate assigned to Li Hsin had been the "all

Thus, the court of appeals properly concluded (Pet. App. 9a) that the ITA's codification of its two-tier BIA methodology, and its selection of the "all others" rates under the second tier of that BIA methodology, were not the types of "change in course" for which *Motor Vehicle* requires an agency to advance an explanation. At issue in *Motor Vehicle* was the rescission by the National Highway Traffic Safety Administration of a requirement that new motor vehicles be equipped with passive restraints to ensure the safety of occupants in the event of a collision. 463 U.S. at 38. The ITA, by contrast, undertook no such rescission.[6]

Atchison, Topeka & Santa Fe Ry. v. *Wichita Board of Trade*, 412 U.S. 800 (1973), on which petitioner also relies (Pet. 12-13), is not to the contrary. *Atchison, Topeka* involved the departure by the Interstate Commerce Commission (ICC) from *settled* precedent. The Commission had approved the imposition by railroads of separate charges for inspection of grain while in

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others" rate from the earlier LTFV investigation. See *Antidumping Duty Order; Bicycle Tires and Tubes From Taiwan*, 49 Fed. Reg. 24,157 (1984).

The ITA's rationale for selecting the highest rate among the rates available for use as BIA for a non-responding party, such as the rate from the LTFV investigation, has been its concern that the BIA rate should not "reward" the party by placing it in a better position than it would have been in had it responded. *Rhone Poulenc, Inc.* v. *United States*, 899 F.2d 1185, 1188 (Fed. Cir. 1990). The Federal Circuit has upheld that rationale as a basis for that practice. 899 F.2d at 1190.

[6] Petitioner claims (Pet. 12) that the court of appeals' first opinion "expressly acknowledged that the ITA had departed from its BIA policy covering multiple-respondent administrative reviews." But that opinion contains no such acknowledgment. Nor does petitioner cite any instance in which the ITA has acted contrary to its practice here.

transit, but a longstanding rule had made such separate charges unlawful unless the carriers could prove that their line-haul rates were insufficient to cover the total transportation service including the portion thereof for which separate charges were proposed. This Court remanded the ICC's determination because the ICC had failed to support its departure from prior cases in which it had invoked the earlier rule. 412 U.S. at 801-806. But in this case, as we have noted, there was no controlling settled precedent from which the ITA departed. Instead, the ITA's adoption of a two-tier methodology represented a codification of prior decisions made under a case-by-case rubric.

Moreover, a principal policy basis for the requirement in *Atchison, Topeka* that an agency explain its change in policy—to enable the reviewing court to understand what the new policies are that the agency is in fact pursuing, 412 U.S. at 822—is absent here. Based upon prior case law, and based upon the ITA's earlier pronouncements, including pronouncements made at the time of the adoption of the two-tier methodology, the lower court was well equipped to understand the policy bases for that methodology. See Pet. App. 35a-37a (explaining agency's bases for that methodology). For that reason, the court of appeals has held twice that the ITA's two-tier method of determining BIA was both reasonable and permissible. Pet. App. 8a-10a, 37a.

2. Petitioner also contends (Pet. 13) that the decision below creates a conflict among the courts of appeals. But the cases petitioner identifies (Pet. App. 87a-89a) as purportedly in conflict with the decision below are all ones in which an agency clearly departed from a prior settled practice and in which under *Motor Vehicles* it was obliged to advance a reasoned explanation for that departure. But as we have explained, that is not the case

here, and the court below stated that it was applying (not challenging) that well-established doctrine.

3. Petitioner finally contends (Pet. 14-18) that the decision below will adversely affect subsequent dumping cases by effectively eliminating judicial supervision over the ITA's antidumping determinations. There is no basis for that conclusion. The court below did no more than hold that the ITA reasonably applied its BIA methodology to the facts of the case before it, and that that methodology had been adopted in a manner consistent with this Court's decision in *Motor Vehicle*. Nothing in the decision below suggests that the Federal Circuit will hesitate to invalidate any subsequent action of the ITA that is not in accord with applicable law.[7]

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[7] Petitioner's assertion (Pet. 16) that it had expected, prior to the ITA's ruling, that a lower dumping duty would be assessed on SNFA's products is irrelevant. Nor was there a reasonable basis upon which petitioner could have had such an expectation. Petitioner did not know, for example, whether or not SNFA would submit the requested data in a timely and adequate manner. Nor did it know whether, if SNFA submitted such data, those data would result in the calculation of a dumping margin that was higher or lower than the "all others" rates set as a result of the LTFV investigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DAVID M. COHEN
VELTA A. MELNBRENCIS
Attorneys

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